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ABSTRACT

This paper examines the relationship between constitutional courts and educational policy in Australia, the United States, and West Germany in an attempt to formulate a statement describing the relative impact of state and federal governments on educational policy in countries with a federal system of government. Much of the paper discusses the constitutional provisions affecting educational policy in each country, focusing in turn on the areas of civil rights, residual powers, finance, and external affairs. The authors conclude that (1) where a constitution for a federal system of government provides for civil rights, educational policy may be directly affected by judicial decisions, and (2) where a constitution allocates powers between federal and state governments, educational policy may be influenced by the federal government, even where education is recognized as a state power, unless the constitutional courts deliberately act to limit the impact of the federal government on educational policy. (Author/JG)

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SCHOOL POLICY, COURTS, AND FEDERALISM:

THE CASES OF AUSTRALIA, U.S.A. AND WEST GERMANY

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> In my opinion it is outside the power of the Commonwealth Parliament to exercise general control of education in the schools or universities of Australia, prescribe what children, and how many of them, shall attend the schools, the method of qualification for entrance, regulate the number of students entitled to matriculate, discriminate between faculties and restrict the number of students to be admitted to or enrolled in any faculty, determine the course of study and curricula in the various faculties of the universities, the nature and subjects of examinations, and set the standards for passing the examinations.[1]

Assertions of similar substance if not detail, made in the highest constitutional courts in Australia, the United States of America and West Germany, seem unequivocal in establishing that the constitutional responsibility for education in these three federations belongs to the States. It might be expected, therefore, that there would be little probability that the Federal governments could influence the obviously States' domain of education in general, and schooling and school policy in particular. Yet in all three countries the Federal governments have become increasingly involved in education to the extent that school policy-makers need to take cognisance of what is being mooted in Canberra, Washington and Bonn when making their decisions, particularly those with a financial component. While the actual involvement by the national Parliament in any particular school's policy may seem remote, the question may be asked whether there is some intrusion into the States' domain and, consequently, some erosion of the federal system. Attention in this paper is paid to the role of the constitutional courts as the umpires in federal systems of government and their part in confirming or opposing centralising tendencies with respect to education.

The purpose of this paper is to formulate a statement which has application in principle to federal systems of government and which appropriately describes and predicts the relationship between the constitutional courts and school policy. To this end it is proposed to test the assumption - which can reasonably be drawn from Australian

evidence - that 'short of the adoption and implementation of a federal ideology by a constitutional court, its interpretation of the allocation of powers in a written constitution and particularly that of education, whether it be a power impliedly or specifically reserved to the States or not, will weight the federal balance in favour of the national government'. In other words, it is not enough merely to have education proscribed as far as the Federal government is concerned, if it is to remain a State responsibility. It is also necessary for the court deciding the issue to hold the view that it is first and foremost defender of the federal system and that its judgments are qualified by this role. The question is whether this conclusion drawn from events in Australia provides a viable proposition for application to federal systems of government in general.

The method adopted in this study is that of historical analysis, that is, relevant decisions of the constitutional courts will be viewed and evaluated from an historical perspective. In his 1965 Rosenthal lecture, William M. Beaney, concerning himself with the role of the Supreme Court, nominated the historical method as one of three traditional approaches which could be used to advantage by political scientists in studies of this kind.[2] Its adoption in this paper is also an indication that historical analysis is more viable than other methods which may be more in vogue in some circles. It would have been difficult, for example, to base this study on a behavioural analysis of the courts. While studies of this kind are well known in the United States, little has been done along these lines in Australia. Research of this kind is out of the question in West Germany where decisions are anonymous and dissenting opinions have not been published. Another line of attack which would be more feasible, but only with a great deal of research before being useful, would be to treat the subject matter on the basis of the role of the courts as change agents in school policy. It is worth noting, for example, that while Wirt and Kirst have asserted that no great claim can be made for the Supreme Court in the U.S. in terms of regime change,[3] a recent editorial in Educational Researcher has claimed that that Court 'has exercised

unprecedented change-agent influence on educational operations' and that this influence has been poorly researched.[4] This example simply indicates that before the role of the courts as change agents could be used to provide a working hypothesis for a comparative study such as this more exact research is required at the national level. Thus, historical analysis has been reverted to since it provides both an adequate and useful means for carrying out the proposed study.

While the historical approach is limited in its reliance on formal documentation which all too often has institutionalised vital social interaction, it is useful in a comparative study such as this in which important variables involving three countries and constitutional systems are involved. Of these nations one, the United States, has had some influence on the political and constitutional provisions in the other two, although these two have developed their own distinct identities. The Australian and West German Constitutions were forged under an American influence which was less pronounced in the former case than the latter. However, West Germany had its own immediate precedent in the Weimar Constitution. The courts themselves are differently constituted with the Legislature deciding the members of the bench by election in West Germany, Executive and Legislative action determining membership of the Supreme Court in the United States, and Executive action alone being required in Australia. This latter country has avoided a system of federal courts by federalising State courts where appropriate, while the United States has a national system of federal courts. The West German system is different again with the existence of State and Federal Constitutional Courts. West Germany is also different with its system of courts not only because the judicial system is inquisitorial as against the adversary position in American and Australia but because its Constitutional Court deals only with constitutional matters while in comparison, comparatively little of the Australian High Court's business is devoted to constitutional issues. Despire these variations in the composition and activity of the High Court, the Supreme Court and the Bundesverfassungsgericht,

the historical approach provides a means of analysing the activities of the several courts vis-a-vis school policy with particular respect to the federal balance.

Education in the Constitutions

Having established both a principle to be researched and the method suitable for the task it is necessary first to turn to the instruments which determine the responsibility for education in the federal systems under discussion. The term 'education' did not appear in the original Australian or American Constitutions nor have they been amended to include the term. 'Education' appeared in Article 7 of the West German Constitution in that government supervision of education was provided for, and religious instruction and private schools were allowed.

The silence in the Australian and American Constitution on the question of education indicates that a probe of the type being attempted in this study must go much deeper into other constitutional provisions. The appearance of 'education' in the West German Constitution, in parts of that document concerned with Basic Rights and Legislative Powers respectively, indicates the need to broaden the enquiry beyond a mere examination of shifts in the balance of allocated powers to the centralising effect caused by the judiciary itself in deciding questions involving civil rights. It is proposed in what follows to examine this last question first and then to proceed to an analysis of the allocation of power beginning with the residual power under which education has been left to the States. The scope of the powers of the Federal governments in Australia, the United States and West Germany with respect to finance and external affairs - to select two of the powers most likely to affect the federal balance in relation to school policy - will then be examined.

Civil Rights

School policy may be affected by the interpretation given to civil rights by the responsible courts in the United States and West Germany. The range of cases in the United States is concisely exemplified in the Yearbooks of School Law published by the National Organisation for Legal Problems in Education in that country. A

review of West German cases is best obtained from the summary of decisions of the Federal Constitutional Court in Friedrich Giese (and others), Verfassungsrechtsprechung in der Bundesrepublik: Entscheidungssammlung. In Australia, however, there are few civil rights in the general sense as in the American Constitution or in the more particular rights with respect to education spelled out in the West German Constitution. There is, therefore, in Australia, no instance in which a High Court decision has affected school policy in that the interpretation of a civil right has required a change in that policy. The result is spelled out in the following example.

Although the Australian Constitution has a different but not dissimilar provision on the establishment of religion to that in the American Constitution, the likelihood is only now appearing of a High Court determination on the validity of Federal aid to denominational schools. A writ challenging such legislation was issued late in 1973 but the case has not yet been heard.[5] In view of the scope of the Grants power, which is discussed below, it is unlikely that the plaintiffs will be successful in this case.

Unlike its Australian counterpart, the United States Supreme Court has been called on frequently to decide the validity of education laws which have been challenged as being in violation of the First Amendment. The general verdict of the Court has been, 'The use of public funds for religious schools is a violation of the First Amendment'.[6] Since the Court provided a working definition of the establishment clause in 1947 it seems to have made it very difficult for denominational schools to obtain direct aid from Federal or State purses.

The situation in West Germany is different again from that in America or Australia in that that country's Constitution guarantees the right to establish private schools. The Basic Law also provides that:

> Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular (bekenntnisfrei) schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.[7]

There is, therefore, no wall between Church and State in West Germany, as there is in the U.S.A. and no possibility of a wall being built as is hoped for by the plaintiffs in the writ lodged with the High Court in Australia. The further provision in the Basic Law that education is a responsibility of the State indicates that if aid to denominational schools was an issue it would not be one involving the Federal Government.

The importance for this study of raising the issue of civil rights in general and this particular example of one such right is not in the different constitutional or judicial positions on any particular issue. What is important is that the principle based on Australian evidence, which is the assumption being examined, is inadequate in that it does not provide for the influence on school policy exercised by courts in their interpretation of civil rights. This influence is direct and may be perceived by those affected by the Courts' decisions as a centralising influence on decision-making in education. It will be necessary, therefore, to include in an adequate principle with general application in federal systems the finding that regardless of the allocation of powers in a federal constitution, a Court may directly influence school policy and create the illusion of a centralising tendency by its judgments on civil rights issues. The end result may be a variation in the federal balance but one brought about by the judiciary and not the legislature.

Residual powers

While education was mentioned in the provisions for basic rights in the West German Constitution, it was not specifically named in the allocation of powers as between Federal and State governments in this or either of the other two constitutions when originally formulated. The question of the place of education in the federal balance devolves, therefore, on the key issue of the interpretation by the courts of the residual powers in the respective constitutions. These powers and the courts' decisions about them require close scrutiny.

In its division of powers between the Federal and State governments the West German Constitution provided that 'the Laender have the right to legislate in so far as the Basic Law does not confer legislative power on the Federation' but 'Federal law shall overrule Land law'.[8] Education was not a power granted exclusively to the Federal Government nor was it included as a concurrent power although

power was given with respect to public welfare, labour law and the promotion of scientific research. The Basic Law was amended in 1969 to give the Federal Government a concurrent power in 'the regulation of educational and training grants and the promotion of scientific research'.[9] Article 75 was also amended to give the national government the right to enact skeleton provisions concerning the general principles governing higher education.[10] Under the terms of a new article the Federal Government was given power to participate in the discharge of three named responsibilities of the States under certain conditions. One of the three fields mentioned was the 'expansion and construction of institutions of higher education including university clinics'.[11] Constitutional power was also given to the national government to co-operate with the States in education planning, the promotion of institutions and projects for scientific research which had supra-regional importance.[12]

Prior to 1969 the Federal government had been involved in some aspects of education partly as a result of the exercise of its given powers as say, in the area of vocational education, and partly as a result of agreements with the States which had no constitutional validity. As early as 1952, for example, the national government began to share the burden of financing universities, which was a State responsibility. By 1969, 17.5 per cent of the budget for university education was provided by the Federal government.

Two administrative agreements between executives of the Federal and State governments which were of importance in the development of education were those which established the Science Council and the Education Council. The former was established as a task force 'reponsible for making recommendations for education and research at the tertiary level, particularly in matters concerning the physical capacity, finance, and staffing of higher education and research'.[13] The Council carried out this task until 1969 from a doubtful constitutional base.

The German Education Council, which replaced a committee established in 1953, was established to advise on the entire education system except the university sector which came within the orbit of the Science Council's activities. The Education Council has reached conclusions

on many facets of West Germany's education system but until 1969 the constitutional validity of its activities was in doubt.

The 1969 constitutional amendments have heralded a more significant participation by the Federal Government in education. Among the important initiatives taken under the new constitutional provision was the establishment in 1970 of a national planning body, the Federal-State Commission for Educational Planning to 'prepare a long-term plan for the coherent development of the total education system' as well as undertaking intermediate and ancillary investigations.[14] This Commission is not only important in terms of its function in education but also as 'an important new turn in the structure of German educational federalism'.[15] Apart from this overall planning arrangement, the national government has become further involved in tertiary education and in the provision of financial assistance to children at school.

The German Federal Constitutional Court has been called on to decide the validity of education laws particularly in relation to the Bill of Rights content of the Constitution. The question of the constitutional responsibility for education was mentioned in the Condordat case in which the Court stated clearly that education was a matter for the States.[16] One point from that case concerned with Federal-State relationships was reaffirmed in the Television case.[17] The Court re-asserted the need for 'moderation in inter-government affairs' in the exercise of constitutional responsibility. It emphasised the need for harmony in relationships between the respective governments and the requirement of fair dealing between them.

As well as playing its role in interpreting civil rights, the United States Supreme Court has been required to comment indirectly and directly on the constitutional responsibility for education in that federal system. Education was not a power accorded the U.S. Congress in the American Constitution. It was given power 'to promote the progress of science and useful arts' but this was a power with respect to copyright.[18] Since 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people' education might be thought of in terms of a reserved State power.

The Tenth Amendment has been the subject of interpretation by the U.S. Supreme Court and its judgments have varied. In McCulloch v. Maryland in 1819, Marshall C.J., in giving the opinion of the Court, noted that the Tenth Amendment did not contain the word 'expressly' thus leaving the question, 'whether the particular power which may become the subject of contest has been delegated to the one government, or prohibitied to the other, to depend on a fair construction of the whole instrument'.[19] The Chief Justice went on to conclude from his analysis of the power of the Congress to make laws 'necessary and proper for carrying into execution the foregoing powers', that the proposition - 'that the government of the Union, though limited in its powers, is supreme within its sphere of action' - could be sustained.[20]

In 1918 'Five Supreme Court Justices amended the Tenth Amendment by interpolating in it the word "expressly"'.[21] The Court held this strong States Rights position until 1941. In that year in United States v. Darley, Justice Stone reviewed the scope of the Tenth Amendment:[22]

> Our conclusion is unaffected by the Tenth Amendment ... the amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers ... From the beginning and for many years the Amendment has been construed as not depriving the National government of authority to resort to all means for the exercise of granted power which one appropriate and plainly adapted to the permitted end.[22]

This interpretation leads to the conclusion that in the U.S.A. the validity of the involvement of the national government in education is not based only on an education power, or the lack of one, but on the full exercise of other given powers.

One power possessed by the Federal government in the U.S.A. which is found in the West German but not the Australian Constitution is contained in the general welfare clause in the Constitution which enables the Congress to 'provide for the common defense and general welfare of the United States'.[23] The relationship of this power to the provision of educational facilities and the impossibility of invoking the Tenth Amendment in support of education as a States' right was

decided in the U.S. District Court in Florida in 1971 in a case in which a challenge was made to certain federal funding of education.[24] The plaintiffs contended, inter alia, that in entering the business of constructing and operating public schools violation was being done to the Tenth Amendment which reserved education to the States. Chief Justice Arnow, who had already decided that the constitutional questions presented for consideration were 'insubstantial', asserted that 'under the general welfare clause, clearly the Congress may provide, as it here provides, financial assistance to local schools, and construct and operate schools where the local boards either may not or will not do so, as provided in the Act'.[25] This decision indicates that the Federal government has a general power to provide educational facilities and the Tenth Amendment cannot operate to make the exercise of that power ineffectual.

Despite its potential powers, the Federal government in the U.S.A. has attempted to maintain the rights of the States in the field of education and, unlike the Australian Parliament, has included in its legislation provisions to protect the States' interests. One example is the 1972 amendment to a 1968 amendment to the Elementary and Secondary Education Act, 1965:

> No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; the Emergency School Aid Act; or the Vocational Education Act of 1963 should be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any education institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.[26]

However, the extent of these provisions was curtailed by the Fifth Circuit of the U.S. Court of Appeals in 1969 and 1972. In the first case the Court held that the matters referred to in the legislation were concerned with details of local school administration 'that the

federal government is not equipped to handle', and that the provisions of the 1964 Civil Rights Act was in no way restricted by the passing of this later legislation.[27] Three years later the Court held that the statute prohibiting Federal intervention in transportation to overcome racial imbalance did not preclude the Federal government from requiring the busing of students as part of a de-segregation programme.[28]

It is clear that the Federal government has played a growing role in the provision of education in the United States although education is still primarily the responsibility of State governments and local authorities. The Courts have been ambivalent in their attitude to the Tenth Amendment at one time holding strictly to the federal balance by giving the Amendment full force and effect and at another time defusing its potential as the protector of 'States' rights.

The Commonwealth of Australia Constitution Act did not provide the Commonwealth Parliament with either an exclusive or a concurrent power 'education'. It would appear, therefore, in the terms of section 107 of the Constitution that as education is not a power exclusively vested in the Parliament of the Commonwealth it remains within the ambit of State powers until such time as it is withdrawn.[29] It would also appear that as education is not a concurrent power under which the Commonwealth Parliament may make laws, the question of inconsistency between its laws and those of a State, as covered by section 109 of the Constitution is not likely to arise.[30]

In examining the possibilities of constitutionally valid involvement by the Commonwealth Parliament in education an important issue to be decided is whether the popular notion that education is a States' right can be maintained in view of the provisions contained in the above-mentioned sections of the Constitution. It is clear that up to 1920, the High Court of Australia placed an interpretation on section 107 which gave weight to the States' rights position.

In 1908, the foundation members of the High Court asserted in a majority opinion that:

> The scheme of the Australian Constitution, like that of the United States of America, is to confer certain definite powers upon the Commonwealth, and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferrred upon the Commonwealth.[31]

They went on to assert that the grant of power to the Commonwealth - in this case the power of taxation - must be considered along with the powers reserved to the States. It was concluded that the meaning of 'taxation' was 'limited by the implied prohibition against direct interference with matters reserved exclusively to the States'.[32]

Isaacs J. attacked the concept in the majority opinion that an implied prohibition of Commonwealth power existed on the basis of reading the Constitution as a whole and contemplating the possible results if the provisions were given their plain meaning. He maintained that such a prohibition could not be constructed from the Constitution itself.

> We search in vain for any declaration that the grant of power is subject to the powers reserved, for that would be either meaningless or would nullify the grant. The Commonwealth's powers are given definitely, and without further reservations than those expressly stated; the powers not granted or withdrawn remain with the States.[33]

Isaacs J. was supported by Higgins J. who stressed the primacy of establishing what the Commonwealth's powers were. 'The Federal Parliament', he said, 'has certain specific gifts; the States have the residue. We have to find out the extent of the specific gifts before we make assertions as to the residue'.[34]

In 1920, with Isaacs J. delivering the majority opinion, the High Court rejected the doctrine of implied prohibition.[35] In his judgment, Isaacs J. was concerned with the content of section 107 of the Constitution. 'It is a fundamental and fatal error', he wrote, 'to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is explicitly stated'.[36] Isaacs J. also stressed the operation of section 109 of the Constitution the moment State legislation encountered repugnant Commonwealth laws.

The position adopted in 1920 has been maintained in successive judgments of the High Court. When giving judgment in the 1942 Taxation cases, for example, Latham C.J. noted that the plaintiffs in the case relied on the argument of implied prohibition to establish the invalidity of Commonwealth laws on taxation.[37] The Chief Justice asserted that sections 106 and 107 of the Constitution did not confer any powers upon

a State or its Parliament. 'These provisions', he said, 'cannot be relied upon to limit by either express or implied prohibition any provision conferring powers upon the Commonwealth. They do make it clear that the Commonwealth possesses only the powers granted by the Constitution. But they do not limit the sphere or restrict the operation of the powers which are so granted'.[38] A similar line of argument was followed by the Chief Justice of the High Court in 1971. Sir Garfield Barwick said:

> Section 107 of the Constitution so far from reserving anything to the States leaves them the then residue of power after full effect is given to the powers granted to the Commonwealth: and then subject to s.109 ... It can thus be seen that the earlier doctrine virtually reversed the Constitution. The question in relation to the validity of a Commonwealth Act is whether it fairly falls within the scope of the subject matter granted to the Commonwealth by the Constitution. That subject matter will be determined by construing the words of the Constitution by which legislative power is given to the Commonwealth irrespective of what effect the construction may have upon the residue of power which the States may enjoy.[39]

The judgments of the High Court on the extent of the reservation of power contained in section 107 of the Constitution lead to the following conclusions:

(a) The Court will give full scope to the exercise by the Commonwealth Parliament of its constitutionally ascribed powers;

(b) Where the Commonwealth, in the exercise of its powers, enters a field in which a State has previously held power, the Court will not interpret section 107 of the Constitution as a reservation of that power to the State and, therefore, beyond Commonwealth power; and

(c) The Court will declare invalid a law of a State which is repugnant to a law of the Commonwealth where the Commonwealth is properly exercising its constitutional powers.

This detailed survey of the position with regard to residual power in the three federations is justified on at least two grounds. In the first place, historical analysis indicates that in the past the Courts in Australia and the United States have held a position in which the maintenance of federal balance was the prime concern and the residual power was interpreted accordingly. That position no longer pertains in these two countries, although it does in West Germany as has been

indicated. Second, the decisions in Australian and American cases related to the constitutional provisions for residual powers indicate the plenary nature of powers which have been delegated to the national governments. Any so-called erosion of State powers with respect to education has to be interpreted, therefore, in the light of other powers allocated to the Federal governments. Two of the more significant powers in this context are those related to finance and external affairs.

Finance

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.[40]

The grants power was included in the Australian Constitution in a decision made at the Premiers' Conference which met in 1899 to iron out some of the problems in connection with the completed draft Constitution. This power was intended to complement the Braddon clause which provided that the Commonwealth could apply one-quarter of the net revenue from customs and excise duties, the imposition of which was one of its exclusive powers, towards its own expenditure.[41] The balance was to be paid to the States in accordance with other provisions in the Constitution. This power was to continue for ten years in the first instance and after that time until the national Parliament decided otherwise.

General purpose grants were paid to the Australian States from 1910 but took on added significance in 1942 when the national government pre-empted the income tax field. This action was taken under a Labor government which introduced a series of taxation Bills as a war-time defence measure. The practical effect of these measures was to establish the Federal government as the sole income-taxing authority. The State Departments were taken over by the national government and, in return for vacating the income tax field, that government was to reimburse the States an amount decided on the basis of their income over the two previous financial years.

After the war the taxation arrangement was taken out of the defence context and placed on a permanent footing by the passing of legislation

which replaced or amended the 1942 Acts. The Federal government continued to control income tax and made reimbursements to the States under the grants power. With the approval of the High Court this practice became entrenched in the Australian federal system. The States became increasingly dependent on the general purpose grants which were made in the years since 1946 so that by 1972-73 of the 57.5 per cent of the States' total receipts which came from Federal grants two-thirds came by way of general revenue assistance.[42]

The remaining one-third of the Commonwealth's payments to the States comprised special purpose grants and many concerned with education were of this sort. One economist has stressed that under a Labor Government specific purpose grants would increase at the expense of general revenue grants (a matter not applauded by the States) and quoted Prime Minister Whitlam:

> From now on we will expect to be involved in the planning of the function in which we are financially involved. We believe that it would be irresponsible for the national Government to content itself with simply providing funds without being involved in the process by which priorities are set and by which expenditures are planned and by which standards are met ...
>
> Where the national government undertakes new or additional commitments which relieve the States or their authorities of the need to allocate funds for expenditure at present being carried by them, there should be adjustments in the financial arrangements between us to take account of the shift of new financial responsibilities. These adjustments will normally take the form of appropriate reductions in the general purpose funds allocated to the States.[43]

The two projections made by the Prime Minister have been carried into effect in his government's assistance in education. The increase in expenditure on education has been applied almost exclusively for specific purposes as defined in the States Grants (Schools) Act 1973. The question of adjustment in financial arrangements has also been carried into effect as, for example, in that while the provision of free places was made a condition of grants to tertiary education in 1973, the general revenue grant to the States was reduced by $112.8 million, the amount by which the States were relieved of expenditure on tertiary education.

Since the 1926 decision in the Roods case the High Court has construed the grants power in broad terms.[44] A limited view of the power was rejected in 1957 in the Second Uniform Tax case.[45] On that occasion Chief Justice Dixon concluded:

> The result of my consideration of the two prior decisions upon s.96 has been to convince me that the decision of the majority of the Court with respect to the Tax Reimbursement Act in South Australia v. The Commonwealth was but an extension of the interpretation already placed upon s.96 of the Constitution. The three decisions certainly harmonise and they combine to give to s.96 a consistent and coherent interpretation and they each involve the entire exclusion of the limited operation which might have been assigned to the power as an alternative.[46]

The amplitude of the grants powers was commented on by several of the judges on the Bench. McTiernan J. said, for example, 'the power conferred by s.96 is a very general one, and the terms and conditions on which the Parliament may grant financial assistance to any State are within its discretion. This discretion is limited only by the scope and object of the power'.[47] Williams J. commented, 'the grant is made out of Commonwealth moneys and it is for the Commonwealth Parliament to say on what terms and conditions such moneys shall be made available. Nothing could be wider than the words "on such terms and conditions as the Parliament thinks fit" and they must include at the very least any terms or conditions with which a State may lawfully comply'.[48] 'It is expressly provided', said Fullagar J., 'that conditions may be imposed, and I cannot see any real reason for limiting in any way the nature of the conditions which may be imposed', while Taylor J. stated that he agreed with the observations of the Chief Justice concerning the matter.[49]

A grants power of the Australian type and the question of the valid exercise of that power are not known in the United States of America or West Germany. In the former there has been no takeover of taxation as in Australia. Grants to the States in the U.S.A. were, until 1973, specific purpose grants and as far as education was concerned came within the general welfare provision of the American Constitution. The types of grants made are illustrated by the provisions of the Elementary and Secondary Education Act of 1965. In Title I of the Act the policy of

the Congress to provide financial assistance to local education agencies serving concentrations of children from low-income families is stated.[50] Payments, however, are made to the States for this purpose. Grants may also be made to the States to assist their education agencies. While there are many and varied grants these examples indicate both that grants are made and made on certain conditions. The competency of the national government to make such grants is not open to challenge on the basis of a grants power, and, as has been shown in the discussion on residual powers, the validity of such grants as an exercise of the general welfare provision has been firmly established.

The distribution of taxation money to the Federal Republic of West Germany is prescribed in that country's Constitution.[51] Until 1969 there was, therefore, no payment to the States as far as education was concerned apart from the constitutional provisions for general assistance. The Federal government had, however, been involved in joint education undertakings, particularly in the field of research as, for example, in assisting in the funding of the Max-Planck Foundation. The 1969 amendment to the Basic Law provided a constitutional basis for this and other involvement. The immediate result of this amendment was the establishment of the Federal-State Commission for Educational Planning in July 1970.

The Basic Law was also amended in 1969 to provide for greater financial participation by the Federal government in education as well as other areas of government responsibility. Following on the report and recommendations of the Fiscal Reform Commission the Constitution was amended to enable the Federal and State governments to engage in the joint task concerning the 'extension and construction of institutes of higher education, including the university clinics'. Being a 'joint task' implies that both Federal and State governments are involved in financing a project and in accordance with the requirement of the Constitution half the expenditure is to be met by the Federal government.

It may be concluded that the constitutional provisions with respect to finance and the Courts' interpretation of those powers give wide scope for Federal involvement in education. In West Germany, where the federal balance is zealously guarded, there is no suggestion yet of a similar breadth of interpretation being given. The 'general welfare'

provision in that nation's Constitution does not seem to have been utilised or interpreted in the way that power has been defined in the United States.

External Affairs

The powers of the Federal government with respect to external or foreign affairs provide them with a means for participation in education to an extent never dreamed of by the framers of the Constitutions. Australia, the United States of America and West Germany are all capable of being party to the International Covenant on Civil and Political Rights, for example. Article 13 of that Covenant establishes several propositions with respect to education. If the Covenant comes into force a signatory, albeit a national government in a federal system, may have an obligation with respect to education - subject to the definition of that power given by the responsible court. It is proposed, therefore, to see what the courts in Australia, the United States, and West Germany have said about the scope of the external powers of the Federal Parliaments in those countries, realising in all three instances that parliamentary activity is consequent upon executive action with respect to foreign affairs.

A broad interpretation of the external affairs power was first given in Australia in the Burgess case in 1936. Evatt and McTiernan J.J. said:

> It would seem clear, therefore, that the legislative power of the Commonwealth over "external affairs" certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers. The legislative power in sec.51 is granted "subject to this Constitution" so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained ... But it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties or conventions; and, to pursue the illustration previously referred to, the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one.[52]

The present position of the High Court is best reflected in a more sober assessment of the external affairs power by Chief Justice Barwick in a recent case.

> I would wish to be understood as indicating that, in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament. What treaties, conventions, or other international documents can attract the power given by s.51 (xxix) can best be worked out as occasion arises.
>
> Once it is decided, however, that some treaty or convention is, or brings into being, an external affair of Australia, there can be no question that the power under s.51 (xxix) of the Constitution thus attracted is a plenary power and that laws properly made under it may operate throughout Australia subject only to constitutional prohibitions express or implied.[53]

With these two cases as authority it would seem possible to make the following observations on the scope of the external affairs power as far as Australia is concerned:

(a) it is a plenary power subject to the limitations imposed by the Constitution;

(b) in the exercise of this power Parliament is limited to making laws which fulfil its obligations in terms of the treaty made or the convention ratified;

(c) in the exercise of this power Parliament may pass laws dealing with subjects over which is has no other constitutional power; and

(d) the power may not be used as a means of acquiring legislative power in domestic affairs per se.

The United States Congress has a role to play in external affairs since it alone can pass the laws which make treaties effective. The power to do this was upheld by the Supreme Court in 1900.[54] The scope of the power has also been commented on by the Court. It has, for example, declared a State statute unconstitutional because it was 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress'.[55] This decision justifies McLaughlin's claims that the Court has not abandoned the position it adopted in 1796 when it asserted the supremacy of enactments related to a treaty over State statutes.[56] In a more recent case the Court asserted that the national government, in the

exercise of its treaty powers, could become involved in areas which would be a violation of States rights if they were laws enacted under the given constitutional powers. This distinction has its basis in the constitutional provision that 'all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land', whereas other laws are made in pursuance of the Constitution.[57]

The subject matter which falls within the scope of the treaty power embraces all proper subjects of negotiation between nations. McLaughlin maintains that the Supreme Court would not entertain the inclusion of matters of internal concern with the scope of the power. However, he also notes that it has become more difficult to isolate such matters as so many have become areas of international discussion.[58] It is, therefore, probable that unless an enactment pursuant to a treaty agreement could be shown to be an internal concern and not an international one, the U.S. Supreme Court would interpret the treaty power in a broad sense. Although no case concerned with education seems to have been tested, it seems reasonable to assume from the general cases discussed that the Executive could sign and the Congress could implement treaties with an education component.

The German Constitutional Court has decided a case in which the relationship between the external affairs power and the provision of education was in question.[59] The relevant facts in this case were that the State of Lower Saxony passed a law on 14 September 1954 establishing a public education system along non-denominational lines. The validity of this legislation was challenged by the Federal government on the grounds that it was inconsistent with the provisions of the 1933 Concordat, made between the German Reich and the Vatican which guaranteed separate education for all Catholic students in Germany.

The Federal government claimed the State was bound by the 1933 agreement under the terms of Article 123 of the Constitution. This Article provided that, subject to the rights and objections of the interested parties, treaties concluded by the German Reich on matters which were a State responsibility under the Constitution remained in force, if still lawful, until new arrangements were made.

The Court held that the 1933 Concordat was still operable. However, it pointed to the distinction between the Weimar Constitution and the present Constitution on the responsibility for education. Under the former, education was to be provided by public institutions. 'The federation, the Laender, and the communities co-operate in their establishment'.[60] The Court pointed out that under the Basic Law, the States had sovereign powers in cultural matters and were only restricted in their performance by the provisions for religious and private education in Article 7 of the Constitution and the related exemption in Article 141. The Court concluded that the foreign affairs power did not operate in West Germany as to disturb the balance of the separation of powers provided for in the Constitution.[61] While it encouraged an attitude of harmony between the Federal and State governments in the application of the provisions of external treaties and agreements, the Court clearly asserted that the right of the States to provide education could not be interfered with by the national government in the exercise of its foreign affairs power.

While the 1957 case clearly defines the relationship between the external affairs power and education as no Australian or American decision does, the position in West Germany is no longer as clear as the decision in the case suggests. Notice has to be taken of the force of the 1969 amendment to the Constitution which gave constitutional power to the Federal government to co-operate with the States in education planning and the promotion of education institutions. As this power is similar in some respects to the Weimar provision it remains to be seen whether the Constitutional Court would regard it as having altered the Federal-State responsibility for education. In view of the Court's strong ideological devotion to the federal principle a change of position does not seem likely. Again, therefore, the West German Court is in contrast with the courts in the United States and Australia which have tended to give plenary scope to the external affairs power without regard to a federal principle.

Conclusion

The purpose of this study was to formulate and test a statement which would not only describe the relationship between the courts and

schools in a federal system but also provides a basis for predicting changes in the federal balance. As a result of this enquiry the following composite proposition is offered as a reasonable principle of interpretation:

(i) where a Constitution for a federal system of government provides for civil rights, school policy may be directly affected by judicial decision;

(ii) where a Constitution for a federal system of government allocates powers as between Federal and State governments (and the federal powers include such matters as taxation, external affairs and defence), school policy may be influenced by a Federal government even where education is specifically or impliedly allocated as a non-Federal government power unless the constitutional court concerned appropriates to itself the responsibility for maintaining the given federal balance and decides cases accordingly.

Notes

1. Per Rich J. in R. v. University of Sydney, Ex parte Drummond 67 CLR 95.

2. William M. Beaney, 'The Supreme Court: The Perspective of Political Science' in Max Freedman and others, Perspectives on the Court, Evanston, Northwestern University Press, 1967, pp. 31-49.

3. Frederick M. Wirt and Michael W. Kirst, The Political Web of American Schools, Boston, Little, Brown, 1972, p. 201

4. Educational Researcher, 3, 7, July/August 1974, pp. 1-2.

5. Writ no. 57 of 1973.

6. Michael R. Smith and Joseph E. Bryson, Church-State Relations: The Legality of Using Public Funds for Religious Schools, Topeka, Kansas, 1972, p. 67.

7. Article 7(3) of the Basic Law for the Federal Republic of Germany (the West German Constitution).

8. Articles 70(1) and 31 respectively of the Basic Law.

9. See Article 74 for the powers of the Federal government.

10. Article 75(1a) of the Basic Law.

11. Article 91a of the Basic Law.

12. Article 91b of the Basic Law.

13. Organisation for Economic and Cultural Development, Reviews of National Policies for Education - Germany, Paris, 1972, p. 29.

14. Ibid, p. 31.

15. Id.

16. 6 BVerfGE 309 (1957) (Second Senate).

17. 12 BVerfGE (1961) (Second Senate).

18. The Constitution of the United States of America, Article 1, Section 8(8).

19. McCulloch v. Maryland 4 Wheaton 316. The extract consulted is in Paul G. Kauper, Constitutional Law, Boston, Little, Brown, 3rd ed., 1966, p. 100.

20. Ibid., at p. 99.

21. Alpheus Thomas Mason, 'Must we continue the States Rights Debate?', 18 Rutgers Law Review 60 (1963) at p. 70.

22. United States v. Darley 312 U.S. 100. The extract is from Mason, op. cit., pp. 70-71.

23. The Constitution of the United States of America, Article 1, Section 8(1).

24. School Board of Okaloosa County v. Richardson 332 F.Supp. 1263 (1971).

25. Ibid., pp. 1266-67.

26. United States Code Annotated (with Cumulative Annual Pocket Part for 1973), Title 20 Education, St Paul, Minnesota, West Publishing Co., 1969.

27. Plaquemines Parish School Board v. U.S. 415 F. 2d 817 (1969).

28. Dandridge v. Jefferson Parish School Board 456 F. 2d 552 (1972), pp. 554-55.

29. Section 107 reads:

> Every power of the Parliament of a colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

30. Section 109 reads:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

31. R. v. Barger (1908) 6 CLR 41, at p. 67.

32. Ibid., p. 78.

33. Ibid., p. 83.

34. Ibid., p. 113.

35. Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 CLR 129, pp. 150-52.

36. Ibid., p. 154.

37. South Australia v. The Commonwealth (1942) 65 CLR 373.

38. Ibid., pp. 422-23.

39. Strickland v. Rocla Concrete Pipes Ltd (1971) CLR 468, pp. 488-89.

40. Section 96 of the Commonwealth (Australian) Constitution.

41. Section 87 of the Commonwealth Constitution.

42. P.B. Wade, 'Recent Developments in Fiscal Federalism in Australia with Special Reference to Revenue Sharing and Fiscal Equalization' in R.L. Mathews (ed.), Fiscal Federalism: Retrospect and Prospect, Canberra, 1974, pp. 46 and 48.

43. Ibid., pp. 14 and 15.

44. Victoria v. The Commonwealth (1926) 38 CLR 399.

45. Victoria v. The Commonwealth (1957) 99 CLR 575.

46. Ibid., pp. 610-11.

47. Ibid., p. 623.

48. Ibid., p. 630.

49. Ibid., pp. 656 and 659 respectively.

50. Sections of the Act as reproduced in A Compilation of Federal Education Laws, Washington, 1971.

51. Article 106 of the Basic Law.

52. R. v. Burgess, Ex parte Henry (1936) 55 CLR 608, p. 687.

53. Airlines of New South Wales Pty Ltd v. State of New South Wales and Commissioner for Motor Transport (1965) ALR 984, p. 995.

54. Chester J. Antieau, Modern Constitutional Law, Vol. II, New York, 1969, p. 365. The case mentioned is Neely v. Henkel (1901) 180 U.S., p. 109.

55. Ibid., p. 38.

56. C.H. McLaughlin, 'The Scope of the Treaty Power in the United States', 42 Minn. L. Rev. (1958) 709, pp. 742-44.

57. American Constitution, Article 6, Section 2. The case was Missouri v. Holland.

58. C.H. McLaughlin, op. cit., pp. 763-64.

59. The Reichskonkordat decision. 6 B Verf GE 309 (1957). (Second Senate).

60. Weimar Constitution, Article 143 in Louise W. Holborn and others (eds.), German Constitutional Documents Since 1871, London, Pall Mall, 1970, p. 163.

61. Reichskonkordat case, op. cit., p. 310.